



38 CFR Part 13

RIN 2900-AR11

Fiduciary Bond

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations that govern fiduciary activities. More specifically, the proposed amendments would revise specific procedures to exempt a VA-appointed fiduciary who is also serving as a court-appointed fiduciary from posting multiple bonds and to also exempt a VA-appointed fiduciary that is also a State agency with existing, State-mandated liability insurance or a blanket bond from having to obtain an additional bond payable to the Secretary of Veterans Affairs.

DATES: Comments must be received by VA on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted through www.Regulations.gov.

Comments should indicate that they are submitted in response to RIN 2900-AR11 – Fiduciary Bond. Comments received will be available at www.regulations.gov for public viewing, inspection or copies.

FOR FURTHER INFORMATION CONTACT: David Klusman, Lead Program Analyst, Pension and Fiduciary Service (21PF), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420; (202) 632-8863. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: VA administers a fiduciary program for beneficiaries who, as a result of injury, disease, the infirmities of advanced age, or being less than 18 years of age, cannot manage their own VA benefits. Under this program,

VA oversees these vulnerable beneficiaries, and appoints and oversees fiduciaries who manage these beneficiaries' benefits. VA's current statutory authority for this program is in 38 U.S.C. chapters 55 and 61.

VA is authorized to issue payments to and supervise fiduciaries acting on behalf of beneficiaries under 38 U.S.C. 5502. In 2004, Congress amended 38 U.S.C. chapters 55 and 61 to add new provisions which, among other things, authorize VA to conduct specific investigations regarding the fitness of individuals to serve as fiduciaries and reissue certain benefits misused by fiduciaries. In relevant part, the law provides that any certification of a person as a fiduciary shall be made on the basis of "the furnishing of any bond that may be required by the Secretary." 38 U.S.C. 5507(a)(3). On its face, this statutory language provides VA with authority to decide whether to require a bond.

Under certain circumstances, if a fiduciary misuses benefits, the law requires that the Secretary pay the beneficiary an amount equal to the amount of benefits that were misused. 38 U.S.C. 6107. In 2018, VA amended its fiduciary program regulations to implement current law. Fiduciary Activities, 83 FR 32716 (July 13, 2018).

As stated above, in some cases, fiduciaries are required to obtain a surety bond in order to protect the beneficiaries' benefits. However, there is conflicting information in VA regulations pertaining to bond requirements for fiduciaries. Specifically, 38 CFR 14.709 provides that VA's general policy is to require a surety bond that follows State laws and court rules from a court-appointed individual fiduciary. Further, the regulation indicates approved alternative methods to a corporate surety bond and authorizes the acceptance of a lesser degree of protection of funds under certain circumstances. However, 38 CFR 13.230, which was promulgated in 2018 when VA amended its fiduciary program regulations, requires that any bond furnished by a fiduciary "[c]ontain a statement that the bond is payable to the Secretary of Veterans Affairs." 38 CFR 13.230(d)(3)(ii). VA's final rule that amended 38 CFR part 13 went into effect on August

13, 2018. 83 FR 32716. When it was promulgated, VA explicitly stated that “[w]e intend to issue uniform rules for all VA-appointed fiduciaries, such as allowable fees, surety bond requirements and appropriate investments, to include fiduciaries who also serve as court-appointed guardians for beneficiaries.” *Id.* at 32727. The rule noted that “VA’s fiduciary regulations will result in a gradual discontinuance of the current practice of recognizing a court-appointed guardian or fiduciary for purposes of receiving VA benefits on behalf of a VA beneficiary” and that, “VA will establish a national standard for appointing and overseeing fiduciaries.” *Id.* at 32735. VA noted in the final rule that, “[b]ased on our experience in administering the program, the risks of not requiring all fiduciaries, with the [general] exception of spouses, to furnish a surety bond significantly outweigh any burden on a prospective fiduciary.” *Id.* at 32727. VA set forth a number of factors that weigh in favor of requiring a bond: (1) it serves as a screening tool for VA to use in confirming qualification for appointment—in other words, if a fiduciary cannot obtain a bond because the bonding company considers the risk of fund exploitation too high, VA will not appoint the prospective fiduciary; (2) it is consistent with VA’s oversight obligations, which include deterring fiduciary misuse of benefits; and (3) it puts a fiduciary on notice that he or she is liable to a third party for any payment on the bond. *Id.* With the 2018 amendment, VA also promulgated additional bond requirements under § 13.230(d) in order to protect a beneficiary’s interests if a fiduciary misuses funds, including a requirement that the bond be payable to the Secretary. More recently, in January 2021, Congress enacted Public Law 116-315, which amended 38 U.S.C. 6107(b), to require VA to reissue misused funds to all beneficiaries, regardless of whether VA negligence was involved.

Under current § 13.410(c), VA must attempt to recoup any misused benefits, either from the surety company or, if no bond is in place, from the fiduciary directly. VA then must reissue any recouped benefits to the beneficiary’s fiduciary successor to the

extent they were not already reissued. Under § 13.230(g), bond expenses may be deducted from the beneficiary's account so that the fiduciary does not have to pay for them out of pocket. Although this cuts into the amount of benefits the beneficiary ultimately receives, VA noted that this provision is "consistent with the protection of funds in guardianships under state and uniform laws." 79 FR 430, 442 (Jan. 3, 2014). While it seems redundant for VA to require a separate bond from a VA-appointed fiduciary who also is serving as a court-appointed fiduciary, VA instituted uniform surety bond requirements as an additional safeguard to "protect the beneficiary's funds." 83 FR 32727. In theory, requiring that a VA-appointed fiduciary obtain a bond that is payable to the Secretary ensures that VA will be able to recoup any misused funds from the surety company rather than having to initiate a collections action against an individual fiduciary. Moreover, in instances where a court-appointed fiduciary already has a bond in place, the bond typically would be payable to the state where the court is located, so VA could not make a direct claim against that bond. If the state-court bond were enough to cover the misused VA benefits, the state would be able to make a claim against the bond to make the beneficiary whole. Thus, at least in some cases, a state-court bond would provide adequate protection for the beneficiary. We note, however, that, in the event that VA reissues benefits and the beneficiary later receives funds recovered from the state-court bond, it is not apparent that VA would have any basis to recoup the excess funds paid to the beneficiary, even though it would amount to double recovery on the part of the beneficiary. A potential problem with VA's practice of requiring multiple bonds is that if a surety company already paid out on a misused-benefits claim under a state-court bond, another surety company would not pay out on the VA bond for the same misconduct. That would therefore defeat the purpose of requiring a second bond made payable to the Secretary. If the purpose of the second bond is to ensure that the beneficiary is made whole in the event of misuse, it does not

make sense to burden the beneficiary with paying for a second bond where there already is adequate protection in place. As a result, VA proposes to amend § 13.230 of its part 13 regulations as described below.

13.230 Protection of beneficiary funds

VA proposes to amend 38 CFR 13.230 to exempt a VA-appointed fiduciary who is also serving as a court-appointed fiduciary with a bond sufficient to protect both VA and non-VA funds from posting multiple bonds and to exempt a VA-appointed fiduciary that is also a State agency with existing, State-mandated liability insurance or a blanket bond from having to obtain an additional bond payable to the Secretary of Veterans Affairs. The proposed amendment is within VA's general rulemaking authority under 38 U.S.C. 501(a) and implements VA's authority under 38 U.S.C. 6107. The proposed amendment would eliminate duplicative fees from being charged against a VA beneficiary's funds for an additional, unnecessary bond. Additionally, VA beneficiaries who are victims of misuse of their benefits by their VA fiduciaries would not experience undue delay in the reissuance of their misused benefits. Further, the bond requirement in 38 U.S.C. 5507(a)(3) gives VA discretion to determine whether to require a bond.

Under current rules, 38 CFR 13.230, does not include an exception to the bond requirement for court-appointed fiduciaries. Further, § 13.230 specifically requires that any bond furnished by the fiduciary "[c]ontain a statement that the bond is payable to the Secretary of Veterans Affairs."

VA proposes to amend § 13.230 to add an exception for posting an additional bond for an individual serving as a court-appointed fiduciary, where a bond is in place under State law and court rules and is sufficient to protect both VA and non-VA funds and to add another exception for a VA-appointed fiduciary that is also a State agency with existing, State-mandated liability insurance or a blanket bond to not have to obtain

an additional bond payable to the Secretary of Veterans Affairs. This amendment is authorized by VA's general rulemaking authority in 38 U.S.C. 501, and by the discretion conferred by 38 U.S.C. 5507(a)(3).

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. See *also* 5 CFR 1320.8(b)(3)(vi).

The information collection requirement in § 13.230 is currently approved by OMB and has been assigned OMB control number 2900-0804. The proposed rule includes provisions involving a revised collection of information under the Paperwork Reduction

Act of 1995 that will require approval by OMB. The proposed rule would not involve a substantive or material modification of the approved collection.

Title: Protection of beneficiary funds.

Type of Information Collection: Modification of a currently approved information collection.

OMB Number: 2900-0804.

Summary of collection of information: The amendment to the collection of information in proposed § 13.230(c)(1) would eliminate the requirement for a VA-appointed fiduciary who is also serving as a court-appointed fiduciary to post multiple bonds and would also eliminate the requirement for a VA-appointed fiduciary that is also a State agency with existing, State-mandated liability insurance or a blanket bond to obtain an additional bond payable to the Secretary of Veterans Affairs. The proposed amendment to § 13.230(c)(1) would decrease the estimated annual number of respondents and consequently reduce the estimated total annual reporting and recordkeeping burden.

The estimated annual burden for the revised collection of information would be determined as follows:

Description of need for information and proposed use of information: There would be no change in the need for information nor the proposed use of information collected for OMB-approved Control Number 2900-0804. The information is needed to facilitate VA's oversight regarding the funds under management protection requirements prescribed in proposed § 13.230.

Description of likely respondents: Certain fiduciaries appointed by VA who manage VA benefit funds in excess of \$25,000. As stated, the proposed rule would exempt a VA-appointed fiduciary who is also serving as a court-appointed fiduciary from posting multiple bonds and would also exempt a VA-appointed fiduciary that is also a

State agency with existing, State-mandated liability insurance or a blanket bond from having to obtain an additional bond payable to the Secretary of Veterans Affairs. This change would reduce the number of respondents.

Estimated number of respondents per year: 9,634 annually.

Estimated frequency of responses per year: Once per year.

Estimated number of responses per year: 9,634 annually.

Estimated average burden per response: The estimated average burden per response for OMB-approved Control Number 2900-0804 has not changed and remains at 1 minute.

Estimated total annual reporting and recordkeeping burden: 161 hours.

Estimated total annual respondent burden cost: \$4,358.

VA estimates that the proposed rule would reduce the number of respondents in 2021 by 366 (from 10,000 to 9,634); however, it would increase the current annual respondent burden costs from \$4,008 to \$4,358, resulting in an estimated information collection burden costs increase of \$350 (161 burden hours x \$27.07 per hour). The Bureau of Labor Statistics (BLS) gathers information on full-time wage and salary workers. According to the latest available BLS data, the mean hourly wage is \$27.07 based on the BLS wage code – “00-0000 All Occupations.” This information was taken from the following website: https://www.bls.gov/oes/current/oes_nat.htm.

Regulatory Flexibility Act

The Secretary certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This regulation has the potential to impact

all 2,350 small entities within the North American Industry Classification System Code 524126 (casualty and bonding companies). There is a projected loss of revenue of \$66,989 per firm which yields a 0.16% revenue loss to each entity. Based on this analysis, we conclude that this regulation will not have a significant economic impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this proposed rule are as follows: 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 13

Surety bonds, Trusts and trustees, and Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 24, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts
Regulation Development Coordinator
Office of Regulation Policy & Management
Office of General Counsel
Department of Veterans Affairs

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 13 as follows:

PART 13 – FIDUCIARY ACTIVITIES

1. The authority citation for part 13 continues to read as follows:

Authority: 38 U.S.C. 501, 5502, 5506-5510, 6101, 6106-6108, and as noted in specific sections.

Source: 83 FR 32738, July 13, 2018, unless otherwise noted.

2. Revise § 13.230(c)(1) to read as follows:

§ 13.230 Protection of beneficiary funds.

* * * * *

(c) * * *

(1) The provisions of paragraphs (a) and (b) of this section do not apply to:

- (i) A fiduciary that is a trust company or a bank with trust powers organized under the laws of the United States or a state;
- (ii) A fiduciary who is the beneficiary's spouse;
- (iii) A fiduciary in the Commonwealth of Puerto Rico, Guam, or another territory of the United States, or in the Republic of the Philippines, who has entered into a restricted withdrawal agreement in lieu of a surety bond;
- (iv) A fiduciary that is also appointed by a court and has obtained a state-court bond, as referenced in 38 CFR 14.709, sufficient to cover both VA and non-VA funds; or
- (v) A fiduciary that is also a State agency with existing, State-mandated liability insurance or a blanket bond sufficient to cover both VA and on-VA funds.

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